Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE S. ROGOW
Counsel of Record
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre
Suite 1930
500 East Broward Boulevard
Fort Lauderdale, FL 33394
(954) 767-8909

Attorneys for Petitioner

167728

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), authorize the imposition of liability for attorneys' fees upon a plaintiff whose case, while lost, was based upon evidence of ethnic discrimination that the district court found sufficient to withstand summary judgment and, after a trial proffer, sufficient to present to the jury?

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The per curiam affirmance without opinion by the United States Court of Appeals for the Eleventh Circuit is unreported. It is reproduced in the appendix at App. 1a. The denial of rehearing is reproduced at App. 33a. The order of the district court determining that the defendants were entitled to attorneys' fees under 42 U.S.C. § 1988 is unreported. It is reproduced in the appendix at App. 4a-32a.

STATEMENT OF JURISDICTION

The original opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on February 16, 2001. A timely motion for rehearing was denied on March 28, 2001. App. 33a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988.

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its

> discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

STATEMENT OF THE CASE

Mahfouz El Shahawy, M.D. sued the Sarasota County Florida Public Hospital Board (SCPH) and its members "alleging various civil rights violations (based primarily on his Egyptian descent and national origin, but also on the exercise of his First Amendment rights and general due process theories), as well as state contract law and tort claims." App. 6a.

The dispute arose from the Board's 1991 denial of hospital privileges to Dr. Shahawy, and ensuing litigation which resulted in the Board settling with a payment of $500,000 to Dr. Shahawy, his releasing the Board and its members, and the Board agreeing "to reconvene consideration of Plaintiff's application . . . under a modified version of the scheme set forth in the SCPH Bylaws." App. 6a.

The district court recounted the next events:

> As with the consideration of Plaintiff's application originally in 1991, this modification scheme initially produced a favorable reconsideration of Plaintiff's application. However at the final meeting at which the full Board considered Plaintiff's application, Plaintiff became disruptive and threatened the Board. The Board thereafter denied Plaintiff's application. Relying in part on Plaintiff's conduct before them,

> the Board concluded that Plaintiff posed a threat to the providing of patient care at and otherwise [sic] to the smooth operation of SCPH.

App. 6a.

That action prompted Dr. Shahawy's lawsuit leading to this petition, a lawsuit that the district court described this way: "[T]he core of his Complaint, both factually and legally, was the assertion that the individual Defendants bore prejudice against Plaintiff because of his Egyptian descent and national origin and thus conspired to, and did in fact, deny his privileges application." App. 7a-8a.

The strongest evidence of discrimination that Dr. Shahawy had was testimony from Board Member Bonniejean Christensen. The Court required a proffer of her testimony before submitting it to the jury. The proffer included this colloquy:

> Q. At any time have you ever heard anyone refer to Doctor Shahawy in a way which exhibited to you some degree of national origin animus or which exhibited to you some prejudice based upon his accent or other distinguishing characteristics?
>
> A. Yes, sir.
>
> Q. Tell us in summary form, if you can, what you heard and who you heard say that.
>
> A. All right. During the electioneering period, comments about his — what they — what

made it seem as though he were inarticulate in English, which he isn't. It's just that he has an accent. There were comments about his being a "camel driver" and a "nigger on the Nile" and an African and comments about his being married to a white woman. And these things were from that period before my election through my tenure on the Board that such comments were made.

Q. All right. We're going to try to get a little bit more specific, if we can.

Can you identify any of the speakers of these comments as you've just relayed to us? Who, in other words, were making the statements?

A. It's sort of like the dirty jokes that one Board member tells: I don't remember them. I know which group of people, because normally they were standing in groups.

Q. All right. Identify for us the members of the group who were standing as a part of a group.

A. One group —

THE COURT: When are we talking about this group, now? We're talking about during the electioneering?

THE WITNESS: Yes, Your Honor.

THE COURT: In the fall of 1991?

THE WITNESS: Yes, Your Honor.

One group of candidates was Mr. Albertson and Mrs. Cobb and Mr. Moss, and I could identify Mr. Albertson's voice and it wasn't his. I can't be more specific than that.

THE COURT: What did you hear?

THE WITNESS: That was the one about the camel driver and something about his lack of knowledge of English.

THE COURT: And you don't which of — there was a group of three, Albertson, Cobb and Moss. You know it wasn't Albertson.

THE WITNESS: Yes, sir. And beyond that, I cannot go.

THE COURT: You heard the phrase "camel driver." You don't know what was said about "camel driver" other than just hearing that phrase?

THE WITNESS: That's what I heard that made me turn toward the group and I saw who the group was. And then they were going on about the language.

THE COURT: You said "camel driver," and I wrote down "lack of." What was it that I missed?

THE WITNESS: I think I used the word "articulation," but I'm sure that's not the word they used.

THE COURT: All right.

BY MR. SMITH:

Q. Now, in connection with that conversation, did you gain a sense as to whether they were speaking of Doctor Shahawy specifically?

A. Yes. The name "Shahawy" came trippingly to their lips quite frequently.

THE COURT: At that time?

THE WITNESS: Yes, sir. There were about 14 people running against him, most of them encouraged by the hospital administration.

BY MR. SMITH:

Q. All right. Now, once you became a member of the Sarasota County Public Hospital Board, did you at any time thereafter hear Doctor Shahawy referred to in disparaging terms which would indicate to you some degree of national origin animus.

A. Yes. For the next four years of my tenure, comments about his temperament being different and his attitude toward women being different and his not even being a citizen kind

of remark and being married to a white woman. And then something about — I think they meant the word "wog," but whoever said it used "wop," which is not an accurate derogatory term. That is, an American would make that mistake, not a British citizen.

Q. All right. Now, can you attribute any of those statements to any individual or group of individuals who made such comments?

A. The groups that sort of interwove with each other and made such comments consists of Moss, Cobb, Wilkin, Lee.

THE COURT: Who?

THE WITNESS: Wilkin. I don't believe she's involved in this. She was absent when the vote was taken.

THE COURT: Wilkin and who?

THE WITNESS: Lee.

I'm not sure about Nash. He tended to stand around and grunt a little bit, not to say much aloud, except when he was attacking me.

BY MR. SMITH:

Q. What do you recall being said by those individuals?

A. Things about his nationality as not being an American, not being a citizen, being married to a white woman. Someone was using an expression "out of Africa" or maybe just "African," because "out of Africa" would be a literary thing. And I doubt if our Board members would use that expression.

Q. All right. Do you ever recall Mrs. Lee specifically talking about African origin?

A. She said something once when she was angry about he'd be on my doorstep, and it was something about — I don't know if it was darkies, or in the dark, or what ever it was; and then something about Africa or African. But she was terribly angry and just said, He'll never be at my door. I don't allow people to do that.

Q. Okay

THE COURT: Who said that?

THE WITNESS: Mrs. Lee. It was after a meeting or during a recess in a meeting, and I don't remember why she was so upset and angry at that time.

BY MR. SMITH:

Q. Are there any other comments that you can recall having been made by anyone on the Board during the period of your tenure there which indicated to you some degree of national origin animus?

A. His language, his thought process, his conduct, all of these things seemed to hark back to his being an Egyptian.

THE COURT: No, no, no. I'm not going to permit that. You're going to have to be more specific. She's going to have to be more specific.

R. 27-264-1-10

Shortly thereafter, the district court decided the jury would hear the proffered evidence.

THE COURT: Now, I think that there has been sufficient basis, pursuant to this proffered testimony, to persuade the Court that the Plaintiff ought to be permitted to elicit this testimony that has been presented.

Now, Count 3 of the — or Count 4 of the complaint is predicated on national origin discrimination. That is a count that has been filed against the Board.

It seems to me that with respect to the issue as to the witness not being able to pinpoint precisely who may have made a comment, or comments, on a certain occasion, but knows that it emanated from Board members, that is probative of the issues regarding discriminatory animus. The remarks to which she has testified, in the Court's view, are not too remote.

> There's just so much that the Court can do to parse through each and every comment that was made, and at some point I think it becomes unreasonable for the Court to require that a witness who has assertedly heard and observed a number of comments and remarks by pertinent people, it almost becomes — well, it's not surprising that the witness would be unable to specifically recall exactly which of the Board members made the comment on a certain occasion.
>
> Now, the jury is free to believe or disbelieve this witness.

R. 27-264-18-20.

The jury never got to consider the testimony. At the end of Dr. Shahawy's case-in-chief, the court granted a judgment as a matter of law against Dr. Shahawy. App. 10a.

> In general, the court found that the evidence supporting such [civil rights] claims was "wanting" — that the Plaintiff had done little more than point to the fact that he is of Egyptian ancestry, that his application was denied, and that all of the Board members voted against him, and attempted to force the inference that such was a result of a wide ranging conspiracy.

App. 10a-11a. The court believed that:

> the testimony of alleged slurs and epithets on which he relied to establish the invidiously

> discriminatory animus required for these claims was wholly lacking in one of several ways: the witness was unable to give attribution; the witness was vague as to the specifics of the remarks either as to time or content or both; or the remarks did not necessarily carry with them the putative discriminatory animus.

App. 11a. Despite having allowed the proffered testimony, the court wrote: "At trial, the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member. . . ." App. 21a.

The district court's order holding Dr. Shahawy liable for attorneys' fees pursuant to 42 U.S.C. § 1988 concluded that Dr. Shahawy's claims met the *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), standard: that his civil rights claims were frivolous, groundless, and in addition, in bad faith. App. 16a-29a.

The court viewed Dr. Shahawy's theory of discrimination as "rank conjecture: Plaintiff was Egyptian; Plaintiff and the Board had a rancorous past, including litigation; Plaintiff's application was again denied; therefore such denial must have been based on Plaintiff's ethnicity/national origin and/or his speech critical of the Board and SCPH." App. 22a. The court spoke of the summary judgment order warnings "of the thin ice on which he would be moving if he continued to press his claims," and concluded: "He did not heed the warning." App. 22a.

In his assessment of Dr. Shahawy's motivation, the court addressed the doctor's prior litigation against the Board, his appeals in those cases, including a prior denial of certiorari

by this Court. App. 26a-28a. Finally, the court concluded that except for Dr. Shahawy's breach of contract claim against the hospital for the hospital's failure to follow the terms of the $500,000 settlement agreement it made with Dr. Shahawy, the case was brought in bad faith:

> As the Court has otherwise stated and indicated, Plaintiff's contract claim had an arguable foundation. But the Court is convinced that the remainder of Plaintiff's claims were brought solely to vex and oppress the Board, especially the individual defendants.

App. 29a.

Having found the prevailing defendants to be entitled to attorney fees (App. 4a-32a), the court entered judgment against Dr. Shahawy in the total amount of $380,000 plus $25,000 in 42 U.S.C. § 1988 expert fees. App. 2a-3a. The Court of Appeals affirmed the judgment. App. 1a.

REASON FOR GRANTING THE WRIT

The decision below is " 'an incorrect application of Supreme Court precedent.' " Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, SUPREME COURT PRACTICE, SEVENTH EDITION (1993), *quoting* W. Rehnquist, THE SUPREME COURT 265 (1987).

The precedent is *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The *Christiansburg* standard for awarding attorneys' fees to prevailing defendants in civil rights cases is that:

> a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim

> was frivolous, unreasonable, or groundless, or that the plaintiff *continued to litigate after it clearly became so.* And, needless to say, if a plaintiff is found to have brought or continued such a clam in *bad faith*, there will be an even stronger basis for charging him with fees incurred by the defense.

Id., 434 U.S. at 423 (footnote omitted, first emphasis supplied, second emphasis in original).

Dr. Shahawy's discrimination claim could not have been frivolous, unreasonable, or groundless when he had the testimony of a member of the hospital board who heard other members refer to Dr. Shahawy as a "camel driver" and a "nigger on the Nile" and make comments about his being "married to a white woman." It cannot be said that Dr. Shahawy continued to litigate after his claim "*clearly became*" frivolous, unreasonable or groundless when the trial court concluded that there was enough evidence to survive summary judgment and enough evidence to lead the court to allow the jury to hear one Board member's testimony because she could testify that the offensive remarks "emanated from Board members," and that testimony "is probative of the issues regarding discriminatory animus." R. 27-264-19, p. 9, *supra*.

It is true that the trial court thought Dr. Shahawy's case was on "thin ice," but that does not equate with it being "clearly" being frivolous. "Clearly" means "without equivocation," "without doubt." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Gramercy Books, Division of Random House Value Publishing, Inc. (1996).

The trial court wrote that "[t]he scant deposition testimony and averments presented by Plaintiff in opposition to summary judgment on his civil rights claims, which the court thought were barely sufficient to withstand summary judgment, completely evaporated — or rather, failed to arise at all — at trial." App. 21a. But that conclusion does not mean Dr. Shahawy fell on the wrong side of the *Christiansburg* test. "Barely sufficient" does not mean "clearly" frivolous, unreasonable or groundless. "Evaporated" or "failed to arise" at trial, after holding at trial that the proffer was good enough to let the jury hear it ("I think it is enough that she will be permitted to testify regarding the comments and remarks that were made at various times, and so the Court will permit the proffered testimony with the exception that I just mentioned") (R27-264-20) does not mean that Shahawy continued to litigate after it became "clear" that his claim was frivolous, unreasonable, or groundless. If the court deemed the evidence good enough to be heard by the jury, how could its subsequent deficiency be clear to Dr. Shahawy?

Dr. Shahawy had a reasonable basis for his suit. Even the trial court concluded that the Board's alleged breach of its contract to reinstate Dr. Shahawy had a basis in fact and law. If the Board was capable of breaching its contract after it had paid $500,000 to Dr. Shahawy to settle his claim for the prior deprivation of hospital privileges, would it be unreasonable for Dr. Shahawy to believe that discriminatory animus existed the second time around, where a Board member recounted tales of "nigger on the Nile?" *Christiansburg* states:

> [It] is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff

> did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial.

434 U.S. at 421-22.

The decisive facts turned out to be unfavorable to Dr. Shahawy. But to saddle Dr. Shahawy with fees would be contrary to Congress' goal of "promoting the vigorous enforcement of the provisions" of the civil rights laws. *Id.* at 422. Congress "wanted to protect defendants from burdensome litigation having *no* legal or factual basis." *Id.* at 420 (emphasis supplied). "No," in that context means "not any." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE. It cannot be said that Dr. Shahawy did not have any legal or factual basis for his civil rights claims.

Given the facts that Dr. Shahawy had — facts that the trial court allowed to survive summary judgment and facts that the court vetted before letting them be heard by the jury — the trial court's finding of bad faith must have been the product of his frustration with Dr. Shahawy. He chided Dr. Shahawy, saying

> charges of discrimination against another on the basis of one's ethnicity or national origin is a serious matter; it should not be reflexive when one happens to fail at a particular endeavor. . . . For Plaintiff,

> these civil rights laws, which exist to ensure equality and fair treatment, were merely sophisticated cudgels he hoped to use to beat the Defendants into submission.

App. 29a.

Dr. Shahawy did not "fail at a particular endeavor." Dr. Shahawy's 1991 application for privileges "received a favorable recommendation," which later "became negative based on Plaintiff's argumentative and disruptive conduct before certain committees." App. 5a. Was the ultimate 1991 negative recommendation driven by those who saw Dr. Shahawy as a "camel driver" or was Dr. Shahawy argumentative because he was viewed as a "nigger on the Nile?" It does not matter as to that denial of privileges, because "the Board paid Plaintiff $500,000" and agreed to reconsider his application. App. 6a. The restarted process again "initially produced a favorable recommendation." App. 6a. But when the full Board again denied him, claiming he "became disruptive and threatened the Board" (*id.*), it is not surprising that Dr. Shahawy suspected that racism was the reason, especially where a Board member confirmed his fears. Those facts are not the facts of "bad faith" litigation. Dr. Shahawy may not have had enough evidence to prove his case, and his resort to the courts may have tried the patience of the trial judge, but Dr. Shahawy had good reason to doubt the good faith of the defendants' denial of hospital privileges to him.

CONCLUSION

The decision below is inconsistent with, and erodes the principles of, *Christiansburg Garment Co. v. EEOC*. It presents a question of public importance because of the harsh and chilling impact a substantial attorneys' fee award will have on plaintiffs seeking to vindicate civil rights claims — an impact contrary to the intent of Congress. Certiorari should be granted to review the decision below and reaffirm *Christiansburg's* stringent principles for awarding attorneys' fees to prevailing defendants in civil rights cases only when a plaintiff's claims have *no* factual basis, or are *clearly* frivolous, unreasonable, or groundless.

Respectfully submitted,

BRUCE S. ROGOW
Counsel of Record
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Broward Financial Centre
Suite 1930
500 East Broward Boulevard
Fort Lauderdale, FL 33394
(954) 767-8909

Attorneys for Petitioner

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED FEBRUARY 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14393

District Court Docket No.
95-00269-CIV-T-21B

EL SHAHAWY,

-

Plaintiff-Appellant,

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion, included herein by reference, is entered as the judgment of this Court.

Entered: February 16, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED OCTOBER 7, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NUMBER: 95-269-CIV-T-21B

MAHFOUZ EL SHAHAWY,

Plaintiff,

VS.

MARILYNN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, AND THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants.

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for Attorney's fees and Other Expenses against Plaintiff and in favor of the following Defendants in the following amounts:

in favor of Defendant Sarasota County Public Hospital Board in the amount of $185,000.00 in attorney's fees and $25,000.00 in 42 U.S.C. § 1988(c) expert fees;

in favor of Defendant Richard Nash in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Phyllis Cobb in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Martin Moss in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Ruth Hochman in the amount of $36,250.00 in attorney's fees;

and in favor of Defendant Marilynn J. Lee in the amount of $50,000.00 in attorney's fees.

October 7, 1999

RICHARD D. SLETTEN, CLERK

BY s/ DF DeNicola
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED APRIL 22, 1999 AND FILED APRIL 23, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO 95-269-CIV-T-21-B

MAHFOUZ EL SHAHAWY,

Plaintiff,

v.

MARILYNN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, AND THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants.

ORDER

This cause comes before the Court on Defendants' Motions for Determination of Entitlement to Attorney's Fees and Costs (Dkts. 278, 279, & 280) and Plaintiff's Memorandum (Dkt. 285) in opposition thereto, as well as Defendants Sarasota County Public Hospital and Marilyn J. Lee's Motions to Strike (Dkts. 286 & 287) and Plaintiff's Opposition (Dkt. 291) thereto.

Appendix C

I. Background

The following is a brief summation of the facts and procedural history of this case. The full background of this case is set forth in the Court's 48-page summary judgment Order, its 26-page Order (Dkt. 275) setting forth findings of fact and conclusions of law, and the over 120 other pages of written Orders issued by the undersigned in the course of this case.

Since approximately 1980 and continuing through 1995, Plaintiff Mahfouz El Shahawy, M.D., a cardiologist, has been engaged in litigation with the Sarasota County Public Hospital ("SCPH"), its Board members ("the Board"), and other physicians who practiced and/or served on various administrative committees at SCPH. The primary motivation for that litigation was SCPH's revocation of, and subsequent refusal to reinstate, Plaintiff's privileges to practice at SCPH.

In 1991, Plaintiff resubmitted an application for privileges to practice at SCPH; his application was considered pursuant to the then-applicable SCPH By-laws, which provided a multi-step process of sequential consideration by several hierarchically arranged SCPH committees and entities. Initially, Plaintiff's application received a favorable recommendation; however, partway through the process, the recommendations became negative based on Plaintiff's argumentative and disruptive conduct before certain of the committees. Plaintiff responded by filing a state court damages suit against the Board. When the Board ultimately denied his application, Plaintiff filed a second state court suit seeking a writ of certiorari to review the Board's

decision. These state court cases were combined and mediated, resulting in a settlement agreement between the parties. The three main components of this agreement were: Plaintiff executed a release of all parties; the Board paid Plaintiff $500,000.00; and the Board agreed to reconvene consideration of Plaintiff's application midway through the process, but under a modified version of the scheme set forth in the SCPH Bylaws.

As with the consideration of Plaintiff's application originally in 1991, this modified scheme initially produced a favorable recommendation of Plaintiff's application. However, at the final meeting at which the full Board considered Plaintiff's application, Plaintiff became disruptive and threatened the Board. The Board thereafter denied Plaintiff's application. Relying in part on Plaintiff's conduct before them, the Board concluded that Plaintiff posed a threat to the provision of patient care at and otherwise to the smooth operation of SCPH. Thereafter, Plaintiff filed the instant suit alleging various civil rights violations (based primarily on his Egyptian descent and national origin, but also on the exercise of his First Amendment rights and general due process theories), as well as state law contract and tort claims.

Specifically, in his original Complaint, (Dkt. 1), Plaintiff asserted the following claims:

- Count I against the Individual Defendants for discrimination in violation of 42 U.S.C. §§ 1981 (a) and 2000d-4a, and conspiracy to interfere with civil rights in violation of 42 U.S.C § 1985(2),(3);

- Count II against the Board for denial of due process, based on its alleged failure to follow the terms of the settlement agreement;

- Count III against the Board for discrimination/ retaliation against Plaintiff because of his exercise of his First Amendment rights;[1]

- Count IV against the Board for denial of benefits and participation in a federally assisted program on account of national origin in violation of 42 U.S.C. § 2000d-4a;

- Count V against the Board for breach of contract, based on its alleged failure to follow the terms of the settlement agreement; and

- Count VI against the individual Defendants: unlawful interference with Plaintiff's contractual rights in the settlement agreement.

As the foregoing shows, Plaintiff's theories were several. But the core of his Complaint, both factually and legally, was the assertion that the individual Defendants bore

---

1. Throughout this case the Court and the parties have referred to this claim as the "First Amendment claim." Although the freedoms and guarantees of the First Amendment were clearly the asserted basis for this claim, it is clear that this was, in fact, a claim made pursuant to 42 U.S.C. § 1983, which provides a remedy for violations of constitutional rights. Nevertheless, to maintain consistency and avoid confusion, the Court will continue to refer to this claim as the "First Amendment claim."

prejudice against Plaintiff because of his Egyptian descent and national origin and thus conspired to, and did in fact, deny his privileges application. Inter alia, Plaintiff alleged that Defendants conducted secret meetings, altered the minutes and other records of the Board, attempted to manipulate a Board member in her deposition testimony in the state court suits, made denigrating references to Plaintiff's national origin at an executive session of the Board, and generally committed other acts to carry out their plan.

By Order (Dkt. 35) of July 25, 1995, as subsequently clarified by Order (Dkt. 63) of September 29, 1995, the Court, inter alia, dismissed Counts II and VI with prejudice, dismissed portions of Count I with leave to amend, and denied the individual Defendants' motion to dismiss Count I on the basis of qualified immunity. Defendants filed an interlocutory appeal of this Order. By its decision (Dkt. 133) of September 25, 1996, the Eleventh Circuit reversed this Court's denial of qualified immunity to individual Defendants on the § 2000d-4a portion of Count I and otherwise affirmed.

After the initial Order on the motions to dismiss but prior to the above interlocutory appeal, Plaintiff filed his Amended Complaint (Dkt. 40), asserting the following claims:

- Count I against the individual Defendants for violations of 42 U.S.C. §§ 1981(a), 2000d-4a, 1985(2) & (3);

- Count II against the Board for denial of due process, based on its alleged failure to follow the terms of the settlement agreement;[2]

- Count III against the Board for retaliation against the Plaintiff as a result of exercise of his First Amendment rights;

- Count IV against the Board for violation of 42 U.S.C. § 2000d-4a; and

- Count V against the Board for breach of contract.

By Order (Dkt. 157) of December 13, 1996, the Court considered the Defendants' summary judgment motions and granted summary judgment only as to a portion of Count V; otherwise the Court denied Defendants' motions. However, in that Order, as regards the remaining civil rights claims, and particularly as regards the § 1985 claims, the Court noted the very few, highly generalized bits of evidence which, when taken in the light most favorable to Plaintiff barely created a genuine dispute on the critical issue of intent. The Court expressly warned Plaintiff that he had escaped summary judgment "by the narrowest of margins."

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2. Plaintiff reasserted this claim in his Amended Complaint because at the time he filed such pleading, the Court had not yet issued its Order (Dkt. 63) of September 29, 1995, clarifying to the parties that the Court's Order (Dkt. 35) of July 25, 1995, had in fact dismissed Count II of the original Complaint with prejudice.

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Following the Court's reconsideration of the said Order and granting of summary of summary judgment in favor of the individual Defendants on the § 1981 portion of Count 1, as well as the pre-trial ruling that the Board was immune from liability for damages as to Count V, this case proceeded to trial on the following claims:

- Count I against the individual Defendants for violations of 42 U.S.C. §§ 1985(2) & (3);
- Count III against the Board for retaliation against the Plaintiff as a result of exercise of his First Amendment rights;
- Count IV against the Board for violation of 42 U.S.C. § 2000d-4a; and
- Count V against the Board for breach of contract.

At trial, following the close of Plaintiff's case-in-chief, the Court granted the Defendants' motions for judgment as a matter of law, pursuant to Rule 50(a), as to Counts I, III, and IV: the § 1985, § 2000d, and First Amendment claims. Specifically, the Court held that the evidence presented at that time was insufficient to state a prima facie case of a violation of Plaintiff's rights under § 1985, § 2000d, or the First Amendment.

In general, the Court found that evidence supporting such claims was "wanting" — that the Plaintiff had done little more than point to the fact that he is of Egyptian ancestry,

that his application was denied, and that all of the Board members voted against him, and attempted to force the inference that such was a result of a wide-ranging conspiracy. Specifically, as regards the § 1985 claims, the Court found that the evidence was lacking regarding: (1) a conspiratorial agreement, (2) the individual Defendants' joinder or participation in such agreement; and (3) the existence of an invidiously discriminatory animus based on race or another recognized class. Further, the Court noted that the evidence clearly established the Board's reasonable, non-discriminatory basis for denying Plaintiff's application and that the Board would have reached the same decision that they did, in fact, reach, no matter whether the allegedly improper considerations were factored into the decision to deny Plaintiff's application. Lastly, the Court held that Plaintiff failed on his civil rights claims because the testimony of alleged slurs and epithets on which he relied to establish the invidiously discriminatory animus required for those claims was wholly lacking in one of several ways: the witness was unable to give attribution; the witness was vague as to the specifics of the remarks either as to time or content or both; or the remarks heard did not necessarily carry with them the putative discriminatory animus.

Based on the pre-trial ruling that the Board was immune from liability for damages as to Count V, with the dismissal of Counts I, III, & IV, and, after hearing from the parties, the Court discharged the jury. The trial proceeded thereafter to the Court on Count V only. Thereafter, by Order (Dkt. 275) of July 16, 1998, the Court set forth its Rule 52 findings of fact and conclusions of law, and concluded that the Board had not breached the contract. Based on that ruling,

as well as the Rule 50 rulings at trial, the Court directed the Clerk to enter judgment in favor of Defendants on all counts of the Amended Complaint.

II. Costs Pursuant to 28 U.S.C. §§ 1821 and 1920

Part II of Defendant Board's instant Motion (Dkt. 278) sets forth those costs it seeks to recover Pursuant to Rule 54(d)(1), Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1821 and 1920; attached as Exhibit A thereto is its proposed Bill of Costs.[3] While Defendant Board's motion includes extensive documentation of and provides legal authority for those costs it seeks to recover, Plaintiff's memorandum states only the following in response thereto:

> Dr. Shahawy hereby objects to the reasonableness of the costs identified in Defendants' Bill of Costs.

(Dkt. 285 at p.8). Such a vague assertion does not even make clear whether Plaintiff is objecting to the recovery vel non of such items, merely their amounts, or both.

Recently, when presented in another case with a similar sweeping, non-specific objection to a supported, itemized Bill of Costs filed with the Court, the undersigned ruled that such a vague, unsupported objection was insufficient, for

> [n]ot only is such a violation of Local Rule 3.01 [(b), requiring parties who oppose a motion to file

3. As the Defendant Board's proposed Bill of Costs clarifies, said bill sets forth the costs of all Defendants.

> a supporting brief with citation of authorities], it also improperly shifts to the Court the burden of researching and supporting, where possible, Plaintiffs' . . . arguments. Such is not the obligation of this Court in our adversary system. Plaintiffs have not even cited the relevant statutory language, *see* 28 U.S.C. §§ 1821, 1920, . . . nor have they cited any of the caselaw interpreting and applying those sections, *see, e.g., Desisto College, Inc. v. Town of Howey-in-the-Hills*, 718 F. Supp. 906, 911 (M.D. Fla. 1989) (analyzing, discussing, and applying §§ 1821 and 1920), *aff'd*, 914 F.2d 267 (11th Cir. 1990) (table). Plaintiffs' [o]bjections . . . will thus be overruled.

John R. Staib et al. v. Preprint Publishing Co., Inc., et al., Case No. 96-455-CIV-J-21-C (M.D. Fla. November 5, 1998). The same ruling is appropriate in this case. Accordingly, the Court will direct the Clerk to tax in full the Bill of Costs tendered by Defendant.

III. Attorney's Fees Pursuant to 42 U.S.C. § 1988

A. The Standard

By the instant motions, Defendants also seek to establish their entitlement to recover their fees incurred in defending Plaintiff's civil rights claims, pursuant to 42 U.S.C. § 1988(b). Said section provides, in pertinent part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, . . . 1993, [or] 1985 . . . of this title, . . . [or] title VI of the Civil Rights Act of

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> 1964 [42 U.S.C. § 2000d et seq.) . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

It is well established that in order to recover attorney's fees, at least in part, under§ 1989(b) a prevailing plaintiff must merely prevail in part, *see generally Hensley v. Eckerhart*, 461 U.S. 424 (1983), while a prevailing defendant must meet a higher standard, discussed below, in order to recover any fees at all.

As first enunciated by the Supreme Court as regards Title VII in the case of *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), which standard was made applicable to § 1988(b) in the case of *Hughes v. Rowe*, 449 U.S. 5 (1980), in order to recover under § 1998(b), a prevailing defendant must show that the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *See Christianburg*, 434 U.S. at 422.[4]

In *Sullivan v. School Bd. of Pinellas Cnty.*, 773 F.2d 1182 (11th Cir. 1985), the Eleventh Circuit set forth several suggested factors to aid in determining whether a plaintiff's claim is frivolous under the *Christianburg* standard. These factors include:

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4. The Eleventh Circuit has since stated that the legal standard for determining the frivolousness of a plaintiff's suit is coterminous with the legal standard for determining whether that suit was unreasonable or without foundation. *See Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548, 1558-59 n.15 (11th Cir. 1995).

(1) whether the plaintiff established a prima facie case;

(2) whether the defendant offered to settle; and

(3) whether the trial court dismissed the case prior to trial or held a full blown trial on the merits.

Sullivan, 773 F.2d at 1189.

Additionally, the Court in *Sullivan* stated that the above factors were only general guidelines — not hard and fast rules — and stressed that determinations regarding frivolity are to be made on a case-by-case basis. *See id.* However, as a general principle, the *Sullivan* Court noted that frivolous cases were typically those in which a verdict had been directed in favor of the defense at the close of the plaintiff's case-in-chief. *See id.*[5]

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5. In *Sullivan*, the Court referred specifically to "a motion for summary judgment or a Fed. R. Civ. P. 41(b) motion for involuntary dismissal." *Sullivan* involved a non-jury trial at the district court level. As noted by the individual Defendants, during the time of the district court decision and Eleventh Circuit opinion in *Sullivan*, Rule 41 (b) provided the mechanism for a district court to grant a directed verdict in favor of the defendant at the close of the plaintiff's case-in-chief in a non-jury trial. It is thus clear that, although speaking specifically to the facts of the case before it, by their general reference to Rule 41(b) in the *Sullivan* decision, the Eleventh Circuit was referring to the granting of a directed verdict in favor of the defendant at the close of the plaintiff's case-in-chief, prior to the submission of the case to the trier of fact, be it a judge or jury.

While proof of a plaintiff's subjective bad faith is not a prerequisite to a fee award against him, *see Christianburg*, 434 U.S. at 421, "[a] finding of actual bad faith constitutes a basis for an attorney's fee award regardless of the *Sullivan* factors," *Turner v. Sungard Bus. Sys., Inc.*, 91 F.3d 1418, 1422 n.6 (11th Cir. 1996).

B. Discussion of Sullivan Factors

1. *Whether Plaintiff Established a Prima Facie Case*

Based on the Court's January 15, 1997, directed verdict in favor of Defendants on the remaining civil rights claims, the Defendants argue that Plaintiff failed even to establish a prima facie case and thus they assert that this factor weighs in favor of a fee award. Plaintiff counters flatly that he did establish a prima facie case, arguing that his "claims withstood the test of Defendants' motions for summary judgment, and proceeded to trial on the merits where they were supported by admissible evidence." Plaintiff then recounts a short narrative, part of which includes matters irrelevant to this case (his practice at another hospital in Sarasota and career achievements otherwise) and part of which includes facts contrary to those now established in this case (generally that the settlement agreements were breached).[6]

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6. It is within this narrative that Plaintiff also makes the first of the assertions of his memorandum that prompted the Defendants' motions to strike. Specifically, Plaintiff asserts that "During 23 years of clinical practice, Dr. Shahawy has never had a malpractice claim, although a majority of the physicians on staff have either had such

(Cont'd)

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While the fact that a plaintiff's claims survived summary judgment could be relevant in deciding whether to award fees to a defendant in certain cases, such fact would only properly be considered in a case in which the plaintiff's claims easily withstood summary judgment. But such was not the instant case, in which the Court's summary judgment order expressly warned that Plaintiff's claims survived summary judgment by the narrowest of margins, pointing out the very weak evidentiary basis of his claims.

In any event, Plaintiff herein misapprehends the plain words of *Sullivan* when he asserts that the fact that his claims survived a motion for summary judgment means that he *established* a prima facie case; it does not. In this case, Plaintiff's survival of summary judgment meant simply that all of the cold, record evidence presented to the Court at that time, when taken in a light most favorable to Plaintiff, established a dispute as to an issue of fact material to his claims; however, such ruling did not establish those claims or any element thereof. Further, at the close of Plaintiff's

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a claim or otherwise been subject to discipline for alcohol, emotional, or chemical dependency problems." (Dkt. 285 at 4). When Defendants challenged this assertion, Plaintiff responded as follows:

> Upon reviewing th[is] contention, Dr. Shahawy withdraws the word "majority," but still maintains that a number of physicians on the staff have been sued for malpractice or been subject to discipline.

(Dkt. 291 at 1). In support of this assertion, Plaintiff refers only generally to his and another witness' "testimony at trial and/or deposition testimony."

case-in-chief, the Court expressly held that Plaintiff had failed to establish a prima facie case as to this § 1985, § 2000d, and First Amendment claims, and thus granted a directed verdict in favor of Defendants. This factor thus weighs very strongly in favor of a fee award.

2. *Whether Defendants Offered to Settle*

Defendants make the somewhat off-point assertion that Plaintiff never made a settlement offer that "reflected the weakness of his case," but make no mention of any settlement offers that they made. In his memorandum, Plaintiff responds that Defendants offered to settle this case for $2,500,000.00. Defendants challenge this assertion in their motions to strike, asserting that "no such offer was made to settle this case." Plaintiff responds that such an offer was in fact made, and in his response to the motions to strike tenders a draft settlement agreement, Exhibit 1 thereto. However, review of that exhibit reveals only the following language:

> Dr. Shahawy has requested that the Hospital Board consider paying him $2.5 million in order to terminate all litigation against the Board relating to Dr. Shahawy's staff privileges. Dr. Shahawy and his attorneys have been advised by the mediator that this demand does not come to the Board with the recommendation of the Board's representative, Mr. Bob Strasser.

(Dkt. 291, Ex. 1, ¶ 6). This is clearly only a communication of an offer by Plaintiff, not one by Defendants; further, this document expressly recounts that the Board's representative opposed the offer.

Perhaps realizing that the above-cited document does not support the assertion that the Board actually made such an offer, Plaintiff then goes on to assert that, at least, he believes that the Board authorized a $2.5 million settlement, believes that its counsel failed to communicate said offer to him, and believes that there exists, in the possession of said counsel, a tape recording of the meeting during which the Board made this proposal. However, Plaintiff neither tenders nor identifies any evidence (documentary, affidavit, or otherwise) to support these beliefs.

Lastly, admitting of the possibility that he entirely "misinterpreted" the Board's actions, and thus believed that there was a $2.5 million settlement offer, Plaintiff asserts that the Board at least had offered him $950,000.00 to settle the case. To support this assertion, Plaintiff cites another exhibit — his own Settlement Proposal — which states in pertinent part:

> For the reasons stated [herein], Plaintiff declines the Board's offer to settle this matter for $950,000.00 plus attorney's fees and costs.

(Dkt. 291, Ex. 2, ¶ 5).[7]

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7. Assuming it is correct to speak of such a thing, the overall credibility of this document is questionable. First, the document was clearly drafted to attempt to intimidate Defendants into settling by parading forth every imaginable horror that would result if Defendants did not settle on Plaintiff's terms. Second, several facts and assertions of this document are simply incorrect. For example, at one point this document asserts that "the [Defendants'] multiple

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The foregoing does little to establish either that Defendants made any settlement offers or the amount of those offers. But even assuming that the Defendants did make a $950,000.00 settlement offer, it would be incorrect to place too much emphasis on this fact as regards Plaintiff's civil rights claims. First, although he ultimately lost on his contract claim as well, the Court has not held, and Defendants cannot reasonably assert, that Plaintiff's contract claim was entirely without merit. Such claim was in fact his strongest. But the instant analysis regarding settlement offers focuses on Plaintiff's civil rights claims, as § 1988 only authorizes fee awards under the civil rights statutes. Further, any offer made by the Defendants was made during the course of Court-ordered mediation, and thus should not be weighed so heavily against Defendants who participated therein in good faith. In any event, the Court concludes that this factor weighs more in favor of a fee award than against one.

3. *Whether the Court Held a "Full-Blown Trial on the Merits"*

Defendants note that the Court granted their Rule 50 motions at the close of Plaintiff's case-in-chief and thus assert that this case did not proceed to a "full-blown trial on the merits." Plaintiff maintains the opposite, and asserts that at trial "Dr. Shahawy was able to elicit competent testimony in support of his claims." Defendants are correct.

(Cont'd)
motions for summary judgment were decisively denied . . . ." (Dkt. 291, Ex. 2, ¶ 6.e). As the summary judgment Order itself attests, and as set forth herein, such motions were not in fact decisively denied, particularly as regards Plaintiff's civil rights claims.

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While this case did proceed to trial on Plaintiff's civil rights claims, such claims did not receive a "full-blown trial on the merits," as the *Sullivan* case describes it. Rather, at the close of Plaintiff's case-in-chief, all of Plaintiff's remaining civil rights claims were dismissed by the Court and a verdict thereon was directed in favor of Defendants. The Court did so because the evidence presented by Plaintiff fell far short of establishing a prima facie case as to any of his civil rights claims. As noted in *Sullivan*, cases where findings of frivolity have been sustained typically have been decided in the defendant's favor on such a motion. *See Sullivan*, 773 F.2d at 1189. The Court concludes that this *Sullivan* factor weighs significantly in favor of a fee award — not based merely on the fact that Rule 50 motions were granted, but rather because of the strong reasons for which such motions were granted. The scant deposition testimony and averments presented by Plaintiff in opposition to summary judgment on his civil rights claims, which the Court thought were barely sufficient to withstand summary judgment, completely evaporated — or, rather, failed to arise at all — at trial.

The strongest evidence that Plaintiff purported to be able to muster in support of his claims was that of ethnic slurs allegedly used in reference to him, the allegedly altered Board minutes and other records, and Defendants' alleged intimidation of a Board member following her deposition. At trial, the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member; there was no indication that any of the Board's records had been altered in any material way; and the Defendants' alleged attempts to manipulate another

Board member — although perceived by that Board member to be an implicit request to testify falsely — were in fact shown to be well-deserved criticism for her revelation of privileged, statutorily protected knowledge. Last, and most importantly, Plaintiff presented not a shred of evidence of a conspiratorial agreement or any invidiously discriminatory animus.

Rather, the only thread that could be found to draw these ragged elements together into some vague semblance of the alleged conspiracy was rank conjecture: Plaintiff was Egyptian; Plaintiff and the Board had a rancorous past, including litigation; Plaintiff's application was again denied; therefore such denial must have been based on Plaintiff's ethnicity/national origin and/or his speech critical of the Board and SCPH. The voluminous discovery that the parties undertook — which the Court examined and considered in detail at the summary judgment phase — coupled with the express warnings of the summary judgment order provided the Plaintiff with more than sufficient warning of the thin ice on which he would be moving if he continued to press his claims. He did not heed the warning.

4. *Additional Factors Raised by Defendants*

In their fees motions, Defendants preemptively argued against the proposition that Plaintiff's survival of the defense summary judgment motions precluded a fee award. Plaintiff in fact raised this argument as regards the first *Sullivan* factor, although, as set forth above, the Court did not find this fact relevant to the issue of whether Plaintiff established a prima facie case (as opposed to merely establishing a dispute about

an issue of fact material to a prima facie case). The Court believes, however, that this and some related facts merit some further discussion.

The Court has expended a great deal of effort on this case. Such has been required because of the multiple Defendants and multiple claims Plaintiff needlessly brought into this suit, as well as his attempts to use this suit, once filed, as a vehicle to resurrect claims long since expired, waived, litigated to conclusion, or otherwise barred. Furthermore, the centerpiece of Plaintiff's civil rights claims were his § 1985 claims; as set forth in the Court's summary judgment Order, this statute is complex, arcane, and involves some significant unsettled issues of law. All of these issues had to be dealt with as if they were meritorious prior to trial because such is the presumption dictated by fundamental controlling procedural jurisprudence.

As a result of these many complex claims, the significant personal liability that Defendants faced, and their understandable vigorous defense of this case, the Court has been called upon to resolve many complex issues, particularly as regards the contract claim. But, to borrow the language of the Fourth Circuit, this Court's proper, considered exercise of its duties and its generosity in allowing Plaintiff's civil rights claims to go to trial, albeit with a stern warning, does not negate the Plaintiff's responsibility to litigate factually grounded claims. *Cf. Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Furthermore, Plaintiff cannot rely upon the significant effort expended by the Court to argue that his claims were meritorious. To again borrow words from the Fourth Circuit,

> [a]lthough in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to "blow away the smoke screens the plaintiffs ha[ve] thrown up" before the defendants may prevail.

Hutchinson, 994 F.2d at 1081. Such was the case here.

5. *Additional Factors Raised by Plaintiff*

In his memorandum in response to the Defendants' fees motions, Plaintiff has raised several additional factors which he asserts merit consideration. Although none of them is particularly persuasive or availing, some of these additional factors, and the motions to strike they prompted, will be discussed below.

(a) *Insurance policies*

Contemplating that the Defendants will likely seek recovery of a substantial amount of fees, Plaintiff asserts that in exercising its discretion to award fees the Court should consider that "[t]hese defendants are fully indemnified by the hospital, and their share of attorney's fees will likely be paid by the hospital's insurance policy." Defendants respond, in their motions to strike, that no insurance policy is of record and that in, any event, said policy provides "no coverage whatsoever" for the attorney's fees paid by SCPH. Further, Defendants assert that the policy may or may not provide coverage for a portion of the fees incurred in defending the individual Defendants. In his response to the motions to strike, Plaintiff tenders transcripts of two early 1997 Board

meetings, held shortly after the entry of the directed verdict in this case. According to the transcript thereof, at the first meeting one of SCPH's counsel stated that the Board's insurance policy "may provide for reimbursement of some of the attorney fees incurred in connection with the individual's claims . . ." and stated that as of that time, none of the individual Defendants had paid any attorney's fees themselves "because of the indemnity resolution," which is not explained or elaborated upon. According to the transcript thereof, at the second meeting another of SCPH's counsel indicated that there was insurance "coverage . . . to pay fees for members of the board who are sued under the directors policy." Plaintiff thus submits that the Board should tender its insurance policy to the Court for a determination as to whether the individual Defendants have been indemnified pursuant to that policy.

The foregoing does not establish the scope of the asserted insurance coverage. But, even assuming that such coverage exists for all litigation fees incurred by Defendants in this suit, the Court does not believe that the equities would compel declining to award fees. The Court believes that, in the same manner that a personal injury tort defendant is precluded from relying on a plaintiff's receipt of insurance benefits wholly independent from the defendant wrongdoer in order to lessen the damages otherwise due to the plaintiff, Plaintiff herein may not rely on any insurance coverage that Defendants may have had in order to escape a fee award.

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(b) *Prior Litigation by Plaintiff Against Defendants or Their Predecessors*

Plaintiff also asserts that Defendants' references to his prior litigation are irrelevant, immaterial, and legally improper for the purposes of these proceedings. Further, as regards his prior federal court litigation, he asserts that "there was no prior ruling against Dr. Shahawy in the 1980 federal litigation." This statement is not true. As explained below, in addition to his state court litigation, Plaintiff has brought two prior suits in this Court against Defendants or their predecessors, which suits have been mostly unsuccessful.[8]

In *Shahawy v. Elliott*, Case No. 81-545-CIV-T-WC (M.D. Fla.) Plaintiff sued another physician for defamation and intentional interference with contract. This other physician had, based on his prior observation of Plaintiff's performance of cardiac catheterization procedures, made statements to the Board as part of its consideration, and later denial, of Plaintiff's application for privileges to perform such procedures at SCPH. Following a bench trial, this Court found in favor of the defendant therein on all counts, *see Shahawy v. Elliott*, Case No. 81-545-CIV-T-WC (M.D. Fla. Dec. 22, 1982), and was affirmed, *see* 761 F.2d 696 (11th Cir. 1985) (unpublished decision). Plaintiff sought, but

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8. Much of the history of these prior proceedings, including the text of several unpublished decisions, can be found in the appendix to the Defendant Board's Request for Judicial Notice of State and Federal Cases, etc. (Dkt. 214), filed January 3, 1997, a WESTLAW search in the "FL-CS" and "Allfeds" databases using the query "TI(Shahawy)" will provide a more complete list of Plaintiff's prior state and federal court litigation.

was denied, a writ of certiorari to the U.S. Supreme Court. *See* 106 S.Ct. 840 (1986) (unpublished decision).

In *Shahawy v. Harrison et al.*, Case No. 82-1207-CIV-T-WC (M.D. Fla.) Plaintiff again sued over the Board's denial of his application for cardiac catheterization privileges,[9] only this time he sued the Board, certain Board members, the SCPH Director, and various attorneys and doctors, and alleged antitrust, civil RICO, defamation, § 1983, and § 1985 claims. (Plaintiff's § 1985 claims in that suit were also premised on his Egyptian ethnicity and national origin.) Initially on a motion to dismiss, and subsequently on motions for summary judgment, this Court dismissed all of Plaintiff's claims in that suit. *See, e.g., Shahawy v. Harrison et al.*, Case No. 82-1207-CIV-T-WC (M.D. Fla. October 13, 1983). The Eleventh Circuit affirmed the dismissal of the RICO, defamation, § 1983, and § 1985 claims, reversing only the dismissal of the antitrust claims. *See Shahawy v. Harrison et al.*, 778 F.2d 636 (11th Cir. 1985), *appeals after remand*, 875 F.2d 1529 (11th Cir. 1989), 10 F.3d 1049 (11th Cir. 1995). Plaintiff appealed every adverse ruling to the

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9. The Court used the word "again" because in 1980 Plaintiff filed an action in the Circuit Court for Sarasota County Florida against the Board seeking a writ of certiorari to review the Board's denial of his application for cardiac catheterization privileges. Following an appeal to the District Court of Appeals, *see Sarasota County Public Hosp. Bd. v. Shahawy*, 408 So.2d 644 (Fla. 2d DCA 1981), the Circuit Court held that there was competent, substantial evidence to support the Board's decision and thus denied the writ of certiorari, *see Shahawy v. Sarasota County Public Hosp. Bd.*, Civil Action No. 80-3640-CA-01 (Circuit Court for Sarasota County, Florida, Mar. 16, 1982).

U.S. Supreme Court, but was denied certiorari in all instances. *See, e.g., Shahawy v. Harrison et al.*, 516 U.S. 821 (1995).

The Court concludes that this prior course of litigation is relevant and material to consideration of Defendants' entitlement to a fee award. It is clear that Plaintiff has carried on, and continues to carry on, a largely unsuccessful campaign of litigation against the Defendants and their predecessors — virtually all of whom have carried out their duties properly and thereby opposed or thwarted him. In these prior suits, Plaintiff has asserted several claims similar or identical to those he asserted in this suit, including a due process claim based on a property interest in hospital privileges and a § 1985 claim based on his Egyptian descent and national origin. This prior litigation does not lead the Court to, but rather confirms, the conclusion that Plaintiff's civil rights claims in the instant suit were not only without reasonable foundation but were also brought in bad faith, with a malicious motive, as discussed below.

(c) *Miscellaneous*

The remainder of additional matters raised by Plaintiff relate to particular settlement terms proposed during this case (e.g., an injunction prohibiting him from applying for privileges) or other matters (the asserted unbiased account of the court reporter present at the October 1994 Board meeting) that are neither relevant nor material to consideration of a fee award.

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C. Bad Faith

In addition to the above finding that Defendants are entitled to a fee award pursuant to the *Sullivan* factors, the Court also determines that Defendants are entitled to a fee award based on Plaintiff's bad faith motives in litigating this case. As the Court has otherwise stated and indicated, Plaintiff's contract claim had an arguable foundation. But the Court is convinced that the remainder of Plaintiff's claims were brought solely to vex and oppress the Board, especially the individual Defendants. It is clear to the Court that Plaintiff, referring to his own situation, spun out nearly every conceivable civil rights claim against the Defendant Board members that could be concocted, and asserted those claims against them in their individual capacities. If Plaintiff could have claimed any other protected status (e.g., age, gender, disability) he would undoubtedly have alleged, discrimination on those grounds as well.

The assertion of charges of discrimination against another on the basis of ones ethnicity or national origin is a serious matter; it should not be reflexive when one happens to fail at a particular endeavor. The assertion of charges of a wide-ranging conspiracy, including document altering and witness tampering by public officials, based on such animus is even more serious. For Plaintiff, these civil rights laws, which exist to ensure equality and fair treatment, were merely sophisticated cudgels he hoped to use to beat the Defendants into submission. From his assertion of individual liability of the Defendant Board members on multiple counts, to his prayer for unspecified punitive damages against those Defendants, to his attempts during trial to obtain over-broad

and unwarranted discovery into several of those Defendants' personal lives and finances, to his attempts to use this suit to resurrect claims over a decade old and already resolved, Plaintiff wantonly asserted his civil rights claims to punish the Defendants and further himself personally. Such abuse merits an appropriate sanction to both punish and deter.

D. Scope of Fees Awarded

As quoted above, § 1988(b) only authorizes attorney's fees awards as to those sections enumerated therein, which include all of Plaintiff's civil rights claims asserted herein. Thus, in filing their memoranda and supporting documentation setting forth the exact amounts sought pursuant to § 1988, Defendants should not include any amounts related to the defense of Plaintiff's Count V contract claim. Alternatively, assuming that it might not be practicable to thusly separate the fees, Defendants may present their overall fees (including those incurred in defending the contract claim) and propose a factor by which to reduce those fees to reflect only the amounts spent defending the civil rights claims. Or Defendants may propose some other method for appropriately reducing the fees sought to reflect only those incurred to defend the civil rights claims.

IV. Conclusion

The Court is entirely mindful of the heightened standard that must be met in order to merit an award of fees in favor of the defendants in a civil rights action. But the Court is firmly convinced, having presided over this case since its inception, that the instant case is the rare one in which fees

are warranted. Not satisfied with the fairly debatable contract claim he had, Plaintiff also conjured up multiple other civil rights claims. In the process, Plaintiff abused not only the laws of this nation but also the jurisdiction of this Court. But for his civil rights claims, subject matter jurisdiction over Plaintiff's contact claim would not have lain in this Court. The civil rights laws were thus used not only to cudgel the Defendants but to foist on this Court claims between a citizen and public entity of the State of Florida which claims involved only issues of concern to the State of Florida: the admission of medical doctors to practice in the public hospitals of this State.

Upon consideration thereof, it is hereby **ORDERED**:

1. Defendant Marilyn J. Lee's Motion to Strike, etc. (Dkt. 286) is **DENIED as moot**.

2. Defendant Sarasota County Public Hospital Board's Motion to Strike, etc. (Dkt. 287) is **DENIED as moot**.

3. Defendant Sarasota County Public Hospital Board's Motion for Determination of Entitlement to Attorney's Fees and Costs (Dkt. 278) is **GRANTED**.

4. The Clerk is **DIRECTED** to tax the Bill of Costs appended as Exhibit "A" to Defendant Sarasota County Public Hospital Board's Motion for Determination of Entitlement to Attorney's Fees and Costs (Dkt. 278).

5. Defendant Marilyn J. Lee's Motion for Determination Regarding Entitlement to Attorneys' Fees Pursuant to 42 U.S.C. § 1988 (Dkt. 279) is **GRANTED**.

6. Defendants Richard Nash, Phyllis Cobb, Martin Moss, and Ruth Hochman's Motion for Determination Regarding Entitlement to Attorneys' Fees Pursuant to 42 U.S.C. § 1988 (Dkt. 280) is **GRANTED**.

7. Defendants shall file their memoranda setting forth the amounts, and supporting documentation, sought pursuant to § 1988 ***on or before May 24, 1999***.

8. Plaintiff shall file his responses thereto ***on or before June 14, 1999***.

9. The originals of these memoranda and responses shall be filed in Tampa.

10. Chambers copies of the above documents, prominently designated as such, shall be provided to the Chambers of the undersigned in Jacksonville.

DONE AND ORDERED, at Jacksonville, Florida, this 22nd day of April, 1999.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 28, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-14393-JJ

EL SHAHAWY,

Plaintiff-Appellant,

versus

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: ANDERSON, Chief Judge, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUL 27 2001
CLERK

No. 00-1950

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

FRANK STRELEC
Counsel of Record
DAVID A. WALLACE
WILLIAMS, PARKER, HARRISON, DIETZ & GETZEN
Attorneys for Respondents
200 South Orange Avenue
Sarasota, Florida 34236
(941) 366-4800

168380

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF CASE

This case arises out of the denial of medical staff and clinical privileges to a physician, Mahfouz El Shahawy, M.D. ("Shahawy"), by a local governmental body, the Sarasota County Public Hospital Board (the "Board"). The Board operates a local public hospital, Sarasota Memorial Hospital (the "Hospital"). After formal peer review hearings, the Board concluded that Shahawy's disruptive behavior presented too great a risk of hindering quality patient care at the Hospital and denied Shahawy's application for restoration to the medical staff.

Although this case relates to Shahawy's 1991 application for privileges at the Hospital, disputes between Shahawy and the Board date back to the early 1980s. Shahawy's disruptive behavior, specifically found to adversely affect the quality of patient care and orderly operation of the Hospital, was a major ground when the Board terminated Shahawy's membership on the medical staff at the Hospital in 1983.

In January, 1991, Shahawy filed a new application for medical staff membership. After going through the peer review procedures prescribed by the medical staff by-laws, that application was denied by the Board. Again, Shahawy's disruptive behavior was a ground.

Shahawy filed two suits in state court, one against various then-current Board members, and the other a Petition for Certiorari to review the Board's denial. Pursuant to the settlements of those cases, the peer review of Shahawy's 1991 application was reconvened. Shahawy contended he was no longer disruptive, that he was a changed man.

On October 25, 1994, the Board held a formal hearing. At the conclusion of the hearing, Shahawy exploded into a tirade. His counsel was unable to calm him. On October 31, 1994, the Board met, reviewed the evidence, and voted six to two to deny Shahawy's application.

Shahawy's tirade was the primary reason for the Board's decision. In this regard, the history of Shahawy's relationship with the Hospital, a history of disruptive conduct, was significant. Six Board members believed that because Shahawy flew off the handle on October 25, 1994, there was much too much probability that he would do so again and again.

This litigation followed. The case against the Board went to trial on three counts: a claim that the denial of Shahawy's application was in retaliation for his exercise of his First Amendment right of free speech, a claim that the denial of the application was on account of his Egyptian national origin, and a breach of contract claim relating to the settlement agreements. In addition, there were civil rights claims by Shahawy against five individual Defendants (past and present Board members who voted to deny Shahawy privileges) alleging discrimination based upon his national origin.

Trial before a jury commenced on January 6, 1997. At the conclusion of Shahawy's case-in-chief, the District Court granted the individual Defendants' and the Board's motions for judgment as a matter of law as to all of Shahawy's civil rights claims, including the claims alleging national origin animus and discrimination. The District Court later held there was no breach of contract. Judgment was in favor of all Defendants on all counts.

Shahawy appealed to the Eleventh Circuit Court of Appeals with regard to the contract claim and Health Care Quality Improvement Act immunity. On January 18, 2000, the Eleventh Circuit affirmed, and Shahawy's Petition for a Writ of Certiorari to this Court was denied on October 2, 2000. Shahawy did not appeal the District Court's ruling with regard to either his First Amendment claim against the Board or his national origin discrimination claims against the Board and the individual Defendants.

The District Court awarded attorney's fees, expert fees, and costs in excess of $450,000 in favor of the Board and the individual Defendants against Shahawy. Specifically, as to attorney's fees, the District Court awarded $185,000 in favor of the Board, $50,000 in favor of Defendant Marilyn J. Lee, and $36,250 each in favor of Defendants Richard Nash, Phyllis Cobb, Martin Moss, and Ruth Hochman. Pet. App. 2a-3a.

In the 22-page Order determining entitlement to fees, the District Court conducted a detailed analysis of this case under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Pet. App. 12a-32a. The Court methodically applied the factors enunciated by the Eleventh Circuit in *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985) as general guidelines in making its determination. Pet. App. 14a-22a. In addition to a finding that the Defendants are entitled to an attorney's fees award pursuant to the *Sullivan* factors, the District Court also determined "that defendants are entitled to a fee award based on plaintiff's bad faith motives in litigating this case." Pet. App. 29a.

The District Court noted that the Shahawy's contract case had an "arguable foundation" but that Shahawy's civil rights claims "were brought solely to vex and oppress the Board,

especially the individual defendants." Pet. App. 29a. With regard to the individual Defendants, the Court stated:

> From his assertion of individual liability of the defendant Board members on multiple counts, to his prayer for unspecified punitive damages against the defendants, to his attempts during trial to obtain overbroad and unwarranted discovery into several of those defendants' personal finances, to his attempt to use this suit to resurrect the claims that were a decade old and already resolved, plaintiff wantonly asserted his civil rights claims to punish the defendants and further himself personally. Such abuse merits an appropriate sanction to both punish and deter.

Pet. App. 29a-30a.

The District Court made a special point to acknowledge that attorney's fees are only to be awarded in rare cases:

> The court is entirely mindful of the heightened standard that must be met in order to merit an award of fees in favor of the defendants in a civil rights action. But the court is firmly convinced, having presided over this case since its inception, that the instant case is the rare one in which fees are warranted. Not satisfied with the fairly debatable contract claim he had, plaintiff also conjured up multiple other civil rights claims. In the process, plaintiff abused not only the laws of this nation but also the jurisdiction of this court.

Pet. App. 30a-31a.

After a Petition for Rehearing to the District Court was denied, Shahawy brought his appeal to the Eleventh Circuit. The Eleventh Circuit affirmed, without Opinion, on February 16, 2001. Shahawy's Petition for Rehearing to the Eleventh Circuit was denied on March 28, 2001.

SUMMARY OF ARGUMENT

No important question of federal law that should be decided by this Court is presented by the Petition. The District Court completely, thoroughly, and properly analyzed the Defendants' claims for attorney's fees under *Christiansburg*, finding Shahawy liable for fees. The Eleventh Circuit affirmed, without opinion. The decision below is not in conflict with *Christiansburg*. Each of Shahawy's justifications for a Writ of Certiorari is based on nothing more than Shahawy's disagreement with the District Court's view of the facts and the application of the relevant case law to those facts.

With Supreme Court Rule 10 as a guide, the Petition presents no reason, and certainly no "compelling" reason, why this Court should accept review. Shahawy's Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT, NOR DOES THE DECISION BELOW CONFLICT WITH *CHRISTIANSBURG*

This case presents no important question of federal law that should be settled by this Court. The issues presented are significant only to the parties to the proceeding. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). There is no public or national interest to be served and no policy determination to be made here.

Shahawy's issue is not with the law or with the legal analysis, but instead with the factual determinations that have been made or with his erroneous perception that *Christiansburg* was misapplied. As Supreme Court Rule 10 provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous facutal findings or the misapplication of a properly stated rule of law."

Throughout these proceedings all parties have agreed that *Christiansburg* was the proper Supreme Court precedent to be applied here. The *Christiansburg* rule of law was "properly stated" by the District Court below. Pet. App. 14a. Where the District Court and the Court of Appeals unquestionably applied the correct rule of law and there is no apparent error, certiorari should be denied.

The analysis of the propriety of the award of attorney's fees in favor of defendant in a civil rights action is, of necessity, a case-by-case and factually intensive analysis.

As such, this case is particularly ill-suited for review by this Court. If review is accepted, this Court will be drawn into a factual analysis already performed by two courts, the District Court and the Eleventh Circuit Court of Appeals. In that Shahawy filed petitions for rehearing in both the District Court and the Eleventh Circuit, Shahawy's Petition to this Court seeks a fifth review of the same facts as applied to *Christiansburg*. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

That Shahawy is asking this Court to engage purely in a review of the evidence is illustrated by his reliance on the proffered testimony of one witness, Bonniejean Christensen, a personal friend and political crony of Shahawy's. That the lower courts ascribed the appropriate value to that testimony is also clear. Christensen's testimony was vague, inconsistent, and fragmented. She was unable to identify any specific derogatory comments as coming from any particular individual. For example, with regard to the alleged comment about a "camel driver," she testified that Board members Moss, Cobb, and Albertson were "one small group," in a larger group, in a room with a "great number of people." R. 23-264-29,30. Although Ms. Christensen was able to eliminate Mr. Albertson as the individual who allegedly uttered the phrase, she was unable to identify who actually made the statement. R. 23-264-29. Throughout her testimony, Ms. Christensen noted that she did not remember significant details (such as who said what) regarding the allegedly derisive statements because she "didn't pay any attention . . . to those things," "tried not to . . . remember" the alleged statements, or "simply block[ed] . . . them out." R. 23-264-103,34,30. This, from the witness presenting Shahawy's "strongest evidence." Pet. 3.

The form of the Judgment entered also serves to illustrate that this case is inappropriate for certiorari review. The Judgment for attorney's fees is in fact a series of separate awards in favor of not just the Board but also five individuals. Pet. App. 2a-3a. The Petition seems to ignore this fact. Thus, a review of this case would, of necessity, be a detailed review of the facts as they relate to each of the separate individuals as well as the Board. The total lack of specific attribution of any derogatory comment to any of the five individuals was relied upon by the District Court as part of the foundation for the finding of bad faith.

By his Question Presented, Shahawy suggests that the District Court, having allowed Shahawy's national origin discrimination claims to withstand summary judgment (the District Court warned Shahawy that he was on "thin ice" and that he had avoided summary judgment "by the narrowest of margins") and having permitted Christensen to testify after a proffer, was precluded from awarding fees. That the District Court allowed Shahawy to escape summary judgment and permitted Christensen to testify merely indicates that the District Court gave Shahawy the widest possible leeway, and afforded Shahawy every possible opportunity to prove his case. But *Christiansburg* does not suggest that a district court judge ties his or her own hands with regard to attorney's fees by affording a litigant such opportunities. The District Court was in the best position to analyze the facts of this case under *Christiansburg* and the Eleventh Circuit did not disagree with that analysis.

Shahawy's assertion that the decision below presents a question of public importance is misplaced. This case is only important to the litigants involved. This is "a fact bound issue" of no importance to the public "since similar situations

are unlikely to arise with any regularity." *Massachusetts v. Sheperd*, 468 U.S. 981, 988 n.5 (1984). The unreported District Court Opinion and the Eleventh Circuit's affirmance (without opinion) will have no chilling effect on potential civil rights plaintiffs: future claims of attorney's fees against unsuccessful civil rights plaintiffs will be decided as before, on a case-by-case basis under *Christiansburg*, and will be awarded, as before, rarely.

CONCLUSION

For the foregoing reasons, Respondents respectively request that this Honorable Court deny the Petition.

Respectively submitted,

FRANK STRELEC
Counsel of Record
DAVID A. WALLACE
WILLIAMS, PARKER, HARRISON,
DIETZ & GETZEN
Attorneys for Respondents
200 South Orange Avenue
Sarasota, Florida 34236
(941) 366-4800